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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WILLIAM HICKOCK,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, William Hickock, respectfully prays that a writ of certiorari be issued to review the decision of the Appellate Court of Illinois, which decision affirmed Petitioner's conviction under an Illinois criminal statute.

JUDGMENT AND OPINION OF THE COURT BELOW

The Appellate Court of Illinois, First District, affirmed a judgment of conviction entered in the Criminal Court of Cook County, sentencing petitioner to imprisonment for a term of from one to ten years. The trial court issued no formal opinion, and its decision is not reported. The opinion of the Appellate Court of Illinois is reported at 210 N.E. 2d 808 and at 62 Ill. App. 2d 480 in abstract form only. The opinion is reprinted herewith as Appendix "A".

In a subsequent unreported action, and without opinion, the Supreme Court of Illinois denied petitioner leave to appeal to that Court.

JURISDICTIONAL STATEMENT

The opinion of the Appellate Court of Illinois was rendered on September 28, 1965. A petition for rehearing was timely filed, and was denied on October 14, 1965. A subsequent petition was timely filed with the Supreme Court of Illinois seeking leave to appeal to that Court, a procedure authorized by Statute in Illinois. That petition was denied on January 20, 1966.

Petitioner seeks certiorari in this Court on the theory that his federal constitutional right to due process was violated in the Appellate Court of Illinois. The jurisdiction of this Court is invoked under the provisions of Title 18, United States Code, Section 1257 (3).

QUESTION PRESENTED FOR REVIEW

Where a reviewing court, passing upon a State criminal conviction, misconceives the contents of the record, so that:

(1) The opinion recites as fact, matters not supported by the record; and

(2) Matter clearly shown by the record, is claimed within the opinion not to exist,

And where such misconceptions form the articulated basis for the affirmance of the conviction,

Then, has the unsuccessful litigant been denied due process of law by the reviewing court?[1]

STATUTE INVOLVED

Smith-Hurd Illinois Annotated Statutes, Chapter 38, Section 18-1, provides as follows:

> "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force.
>
> "A person convicted of robbery shall be imprisoned in the penitentiary from one to twenty years."

STATEMENT OF THE CASE

[Petitioner has filed in this Court, nine copies of the record printed for consideration by the State courts. That document is termed an "Abstract". The reference "(A. .....)" is a reference to the relevant page of the Abstract.]

Demetra Lattos, the complaining witness, is a 19-year-old waitress at Connie's Snack Shop in Berwyn, Illinois (A. 2). On October 3, 1963, she finished work at 10:30 P.M. While

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[1] Other points were raised in the Illinois courts, relating principally to the proposition that the evidence was insufficient to provide the requisite quantum of proof of petitioner's guilt. Of course, in themselves, those contentions do not present a federal question, and Petitioner therefore does not feel free to raise them in this Petition. This Petition is directed to the manner in which the issues were decided on review.

walking home, she was accosted under a street light by a stranger who forcibly took her purse (A. 3). The purse contained $27.00 (A. 3). It was later found in a nearby park, the money removed (A. 4).

While struggling with the thief, Miss Lattos uttered loud screams (A. 3). The police arrived shortly following the occurrence, and commenced a search of the vicinity, taking Miss Lattos in their squad car (A. 3).

Attracted by the screams, Eugene Spolar, who lived nearby, went to his back yard and heard someone running down the street. Then he saw a man walking along the sidewalk. The man turned around and began to walk in the other direction. At that time, Spolar saw only dark clothing, could not see the man's face, and was not closer than fifty feet from him. The man walked into the park.

Still unaware what had occurred, Spolar, a trainee with a furniture company, got into his car to investigate. He drove around the area for a while, and then saw a man leaving the park, changing his jacket from the dark side to the light side. He did not identify this man with the man he had seen earlier, but he got a good look at him (A. 10). Continuing to drive around, he saw the police car in which Miss Lattos was driving, and told the policemen what he had seen (A. 11).

Petitioner had worked that day at a part-time job as a mechanic at a used car lot in Berwyn (A. 22). He left work about 10:00 P.M. (A. 23). He testified that after leaving work, he went to a restaurant and ate (A. 23).

Sometime prior to 11:00 P.M., Petitioner walked past a gasoline station at which a Berwyn squad car was parked with two uniformed policemen who stopped him for questioning (A. 16).

The squad car containing Miss Lattos was then called to the gas station (A. 12). It stopped three feet from the spot where Petitioner was standing between the uniformed officers (A. 15). Miss Lattos occupied a rear seat on the same side on which Petitioner was standing (A. 14, 15). No identification was made at that time (A. 15). The detectives left the squad car, conversed with the officers holding defendant, and ascertained that Petitioner was held as a suspect in the robbery (A. 15). The squad car remained at the gas station from two to ten minutes (A. 19, 13). Miss Lattos saw Petitioner (A. 18, 8), but did not leave the car, and made no comment at the time (A. 13, 15, 9).

The squad car then received a radio call, and departed with Miss Lattos to view other suspects (A. 13). They then returned to the gas station, where Petitioner was still being held. Miss Lattos had been informed that Petitioner was a suspect and that she was being brought back to the station for purposes of an identification (A. 13, 8).

The prosecution witnesses are in dispute as to whether she thereupon said that Petitioner "closely resembled" the robber (A. 13, 15, 19). At her request, the officers mussed Petitioner's hair and reversed his jacket (A. 6). Miss Lattos then asked that Petitioner be compelled to say "I have got a knife" and "Give me your purse", the words uttered by the robber at the time of the event (A. 13, 9, 3). At that point, Miss Lattos advised the police that Petitioner was the robber (A. 13).

Petitioner was thereupon searched. The only thing found on his person was $27 in currency (A. 13, 14). The officers counted the currency and found that it totalled $27. Miss

Lattos thereupon announced that this was the exact sum that had been taken from her purse (A. 13). Petitioner was then taken to the police station by the uniformed policemen (A. 14).

Mr. Spolar, meanwhile, had returned home. After a half hour, he again drove out with his wife to see if there were any new developments. While driving, he saw a police car containing two officers and stopped it to talk to them (A. 11). The police told him that they had found a man and wanted him to make an identification. One of them flashed his light on Petitioner in the back seat, and Spolar identified him (A. 12).

Miss Lattos was taken in the detectives' car from the gas station to the park, where the purse was found (A. 13).

On the night in question, Petitioner was wearing a reversible jacket, colored, respectively, grey and black. Miss Lattos stated that at the time of the robbery, the grey side was showing (A. 3). When confronted with Petitioner in the gas station, Miss Lattos told the officers that he was wearing a white jacket, instead of a grey one (A. 6).

Spolar had testified that a man he saw walking out of the park was changing his reversible coat from the dark side to the light side (A. 10).

Miss Lattos originally described her assailant to the police as a young man (A. 26). The police records indicate that she approximated his age at 20 to 25. This description does not fit Petitioner (A. 5), whose age was then 32 (A. 19).

• • •

Petitioner would further present some brief details which he deems of special importance in view of certain statements made within the opinion here sought to be reviewed.

The recitation of the opinion that the testimony of the police "substantially corroborated that given by Miss Lattos and Mr. Spolar", can relate only to testimony concerning events which occurred in the presence of the police after Petitioner's arrest, and not to those witnesses' accounts of what they had observed at and about the time of the commission of the alleged offense.

Insofar as the opinion recites that Miss Lattos gave only direct answers to direct questions, none of which went to the issue of whether she was in fact uncertain of Petitioner's identity, the opinion is not supported by the record. Asked whether she was sure that she had not said that she saw the police officers beating Petitioner, she replied that she was quite sure; that in fact she had never seen that (A. 7). However, asked whether she had told a co-worker that Petitioner was not her assailant, she answered that she could not remember saying that (A. 7). She further testified as follows:

> "Q. Ever tell the police officers you were not sure this was the man?
>
> "A. I have never had an opportunity to tell them of a definite unsurety.
>
> "Q. I do not understand your answer, Miss Lattos, what do you mean, you have never had the opportunity?
>
> "A. Well, I don't see the officers to talk to them, except when we go to court.
>
> "Q. In any of your conversations with the officers, have you told them you were not sure this was the man?
>
> "A. I don't believe so." (A. 4).

The opinion is also in error in stating that Miss Lattos' failure to identify Petitioner the first time she saw him

in the gas station, was the product of her desire to be certain of "lesser facts before she attempted a positive identification." That was the reason given by Miss Lattos for her delay in identifying Petitioner at the time of the *second* confrontation (A. 6). But her failure to identify him on her *first* trip to the gas station is unexplained in the record, except for her testimony that at that time, she was "not asked to identify anyone" (A. 9).

STAGE AT WHICH FEDERAL QUESTION WAS PRESENTED

The federal question here presented, necessarily first appeared with the rendition of the opinion of the Appellate Court. Accordingly, the federal question was argued at the first available opportunity: within the petition for leave to appeal to the Supreme Court of Illinois. That petition, a part of the record filed in this Court, recites as its first point: "Petitioner was denied due process in the Appellate Court." (Petition to Supreme Court of Illinois, page 7).

The Supreme Court of Illinois denied the petition, without opinion. Accordingly, the due process point was rejected *sub silentio* in that Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The generally accepted elements of due process are notice, an opportunity to be heard, and findings based on the evidence. *Tot* v. *U. S.*, 319 U.S. 463, 473; *Smith* v. *Dental Products Co.*, (7 Cir., 1948) *168 F.2d 516, 519.*

Characteristically, an offended litigant contends in the reviewing court that he was denied due process at the trial level.

Yet, there can be no question that the requirements of due process are mandatory at the review, as well as at the trial level. (*Griffin* v. *Illinois,* 351 U.S. 12, 18.)

So far as we know, the contention here made presents to your Honors a matter of first impression. Yet, we believe that such is the very proper office of a petition for Certiorari.

Flatly stated, it is our position that where a reviewing court misconceives, within its opinion, uncontradicted matter of record, to the point that the record is inferred to indicate that which it will not in fact support, and where matter clearly of record is claimed by the opinion not to exist, a litigant has been denied due process on appeal. For the right to be heard necessarily imports not only that one may speak, but that another shall listen.

Within our statement of facts, we have set forth matters shown within the record from the testimony of *prosecution* witnesses. Such matter is, we believe, sufficiently inconsistent with the picture painted by the opinion, as to make the opinion appear the product of advocacy, rather than of judgment. The facts here set forth were urged with

clarity and precision in the Appellate Court. Had the Appellate Court considered those facts and yet affirmed the conviction, we could claim nothing more than simple error. Because of that Court's failure to consider those facts, and because of its intimations and, in some cases, flat statements that such matter is not presented by the record, we claim denial of due process.

We would agree that a reviewing court may with propriety consider only the evidence introduced by the litigant who prevailed before the trier of fact. It may disregard the evidence of the unsuccessful litigant on the theory that the trier of fact did not believe it. But it is not logically possible for a reviewing court to consider only the successful litigant's direct testimony, and to disregard any impairment of that testimony through cross-examination. To do that would be an effective denial of the right of confrontation assured by the Sixth Amendment to the Constitution of the United States. Nor, we suggest, may a reviewing court properly act upon only the testimony of the appellee's witness which is favorable to the appellee, and ignore that portion which is unfavorable. And we urge that this is particularly true in criminal cases.

It is in that light that we ask that your Honors consider, for example, the recitation of the opinion that

> "Miss Lattos did not at that time [the first trip to the gas station] identify Defendant as the assailant . . . (That) does not impair her credibility. Miss Lattos stated at the trial that she wanted to be certain of the lesser facts before she attempted a positive identification, indicating that the delay was occasioned simply by caution."

There is no basis for that contention. Miss Lattos offered no reason for the *initial* failure of identification, other than that she was not asked—surely a meaningless excuse where

the very purpose of her presence in the squad car was to point out her assailant to the policemen if she saw him. Assuredly, the police did not ask her whether each person passed by the car was the assailant; it was her duty to volunteer the information. Her failure to do so was not merely a matter of "caution" or a request for reassurance on "lesser facts." She did not then ask for any "lesser facts." Instead, having seen Petitioner in police custody, she went off with the police to view other suspects.

Miss Lattos had also given a description of her assailant which substantially conflicted with the age of the Defendant. In her first description to the police, she stated the man was between 20 and 25 years of age (A. 5); the Defendant's age is 32 (A. 19), and he looks his age (A. 5). This misstatement of age does little to inspire confidence in her ability to have received an impression of sufficient vividness and certitude to warrant a penitentiary sentence.

In addition, a defense witness, Rita Bernklaw, who works with Miss Lattos, testified that Miss Lattos had stated openly that she was unsure of the Defendant's identity. Miss Lattos' response at trial to that suggestion points out a further flaw in her identification of the Defendant, for she testified that she "does not remember" telling the witness that she was not sure Defendant was the robber (A. 7). She also testified that she "never had the opportunity to tell them (the police) of a definite unsurety" (A. 4), and that she did not believe that she ever told the police that she was not sure. Finally, when called as witness on rebuttal, in an effort by the prosecution to straighten the matter out, the same reaction was evoked (A. 25, 26).

In the face of such equivocal testimony at trial, the Appellate Court concludes that

> "Nothing in the record indicates that Miss Lattos entertained any doubt that the defendant was the assailant."

The basic premise of the opinion is not supported by the record. Its conclusion, therefore, cannot be deemed the product of a proceeding in which the fundamentals of due process have been accorded.

We ask that your Honors insist that criminal convictions, at every judicial level, be the products of reasoning from premise to conclusion, and not the converse. We respectfully suggest that this case is an appropriate vehicle for the accomplishment of that objective.

CONCLUSION

For the foregoing reasons, we pray that your Honors will consider this a fit case for the grant of the writ of Certiorari.

Respectfully submitted,

MELVIN B. LEWIS,
Attorney for Petitioner

OPINION OF THE APPELLATE COURT

Mr. Presiding Justice Burke Delivered The Opinion of the Court:

Defendant was convicted of robbery at a bench trial and sentenced to one to ten years in the penitentiary. He appeals.

Shortly after 10:30 P.M. on October 3, 1963, Demetra Lattos was returning home from her job as a waitress in a snack shop in Berwyn, Illinois. She was walking in an easterly direction from Harlem Avenue on 32nd Street and noticed a man approaching from the west. As the two passed, the man grabbed Miss Lattos' purse, hit her and said, "I have got a knife. Give me that purse." The assault occurred at the alley between Maple and Wisconsin Avenues, immediately below a large fluorescent street light. Miss Lattos was screaming during the incident. The assailant took the purse and ran northward into the alley. Two plainclothes detectives arrived at the scene a few minutes later, and the assailant was described as wearing a black waist-length jacket, dark trousers, a white T-shirt and no hat. Miss Lattos entered the officers' automobile and a search was made of the area. In response to a radio dispatch a short while later they proceeded to a gasoline service station at 26th Street and Harlem Avenue, a short distance from where the assault had occurred. Defendant was in the custody of two uniformed police officers who had stopped him for questioning in connection with the robbery. Miss Lattos did not at that time identify defendant as the assailant. The detectives and Miss Lattos then proceeded elsewhere in response to another radio dispatch and later returned to the service station at 26th Street and Harlem Avenue. Miss Lattos was asked if defendant was the as-

sailant, and she stated that he strongly resembled him, but that defendant's hair was too neat and his jacket was lighter than that worn by the assailant. Defendant, who was wearing a reversible jacket, was made to reverse his jacket to the dark side; his hair was messed and he was told to repeat the words spoken by the assailant during the assault. Miss Lattos immediately identified defendant as the assailant. Defendant was searched and $27.00 recovered from his person, the exact amount in Miss Lattos' purse when it was stolen; the denominations of the bills were also identical to the denominations of the bills in the purse.

Eugene Spolar, who resided at 3105 Maple Avenue in Berwyn, testified that about 11:00 P.M. on the night in question he heard woman's screams coming from the vicinity of the alley between Maple and Wisconsin Avenues at 32nd Street. He went into his back yard and heard someone running northward on Wisconsin Avenue. The running slowed to a walk and the witness saw a man walking northward wearing a dark jacket. When the man reached the corner of 31st Street and Wisconsin Avenue, he turned and proceeded westward on 31st Street. At the same time Mr. Spolar went to the 31st Street end of the alley in an effort to see who the man was. The man walked to within 50 feet of the witness, turned around and proceeded easterly on 31st Street toward a local park. At this point Mr. Spolar got his automobile and circled the park. A short time later he saw the same man emerge from the park combing his hair and reversing his jacket from the dark side to the light side; the man walked west toward Harlem Avenue. Mr. Spolar located and informed the detectives who were with Miss Lattos of what he saw and gave a description of the man. He later identified defendant as the man he had seen entering and emerging from the park. The witness testified that he could not remember whether defendant was carrying anything when he entered the park,

but that he definitely was not when he emerged. The purse was later found without the money upon a search of the park.

Two of the four police officers involved in the investigation of the assault and the arrest of defendant testified for the State. Their testimony substantially corroborated that given by Miss Lattos and Mr. Spolar. In addition, one of the officers stated that he and his partner stopped defendant for questioning because defendant fitted the description of the assailant which they had received by radio. Defendant was stopped at 26th Street about 11:10 P.M. while walking north on Harlem Avenue.

Defendant testified in his own behalf. He stated that he left work about 10:00 P.M. and stopped for something to eat. He was on his way to 22nd Street for a taxi cab when he was stopped by the police. Defendant stated he had $32.94 on his person at the time he was arrested, which was denied by the police officer who searched him. Defendant attempted to account for the $32.94 by saying that he received $10 pay and a $20 loan from his employer, and had arrived at work that day with just over $4 in his pocket. The $10 pay and the $20 loan were corroborated by his employer, who testified for defendant. Both defendant and his employer had past criminal records.

Rita Bernklau, a waitress and co-worker of Miss Lattos and a friend of a friend of defendant, testified that she overheard Miss Lattos say she was uncertain of the identity of the assailant. The witness stated she did not hear the entire conversation because she was busy waiting on customers. In rebuttal, Miss Lattos said that she could not remember having made such a statement at any time.

Defendant maintains that the testimony given by Miss Lattos and Mr. Spolar is not worthy of belief, for the reason that Miss Lattos' testimony is equivocal as to her

certainty of the assailant's identity and for the further reason that she substantially misstated defendant's age in her description to the police and had failed to identify defendant as the assailant when she was at the service station the first time. Defendant claims that the testimony of Mr. Spolar is valueless for the reason that he was an amateur in criminal investigation.

While it is true, as defendant suggests, that the reviewing court will examine the evidence in a criminal case and will reverse the conviction if it is unreasonable and unsatisfactory as to raise a reasonable doubt as to the defendant's guilt, the finding of the trier of fact as to credibility of the witnesses is entitled to great weight. *People* v. *Dawson*, 22 Ill.2d 260, 264. The record in the case at bar does not indicate that the trial judge was in error in believing the State's witnesses and disbelieving the defendant's witnesses.

The instances characterized by defendant as "equivocal testimony" on the part of Miss Lattos are no more than direct answers given to direct questions. She was asked whether she had ever told anyone she was uncertain of the assailant's identity, to which she answered that she did not believe so and that she could not remember ever having made such a statement. None of the questions went to whether Miss Lattos ever in fact entertained an uncertainty as to the assailant's identity. On the contrary, Miss Lattos stated on cross examination that, as far as she knew, she had never entertained a doubt as to defendant's guilt. She further stated that, while she could not say that she was ever uncertain, she was definitely certain of defendant's guilt when his jacket was reversed and his hair messed. Miss Lattos testified that she remembered the voice of the assailant and still remembered it at trial.

Miss Lattos' statement at trial that defendant did not look as young as she originally thought him to be does not substantially impair her credibility, in view of the immediate and positive identification of defendant as the assailant after his jacket was reversed, his hair messed and he, on request, spoke the words used by the assailant. The mere fact that she identified defendant as the assailant the second time she viewed him at the service station at 26th Street and Harlem Avenue, rather than the first time, does not impair her credibility. Miss Lattos stated at the trial that she wanted to be certain of the lesser facts before she attempted a positive identification, indicating that the delay was occasioned simply by caution. Nothing in the record indicates Miss Lattos entertained any doubt that defendant was the assailant.

Defendant theorizes that Mr. Spolar's evidence is valueless because he was a private citizen untrained in police investigation, and that his identification of defendant as the man he saw entering and emerging from the park is questionable because Mr. Spolar felt "his job is not complete until conviction is obtained." The matters testified to by Mr. Spolar, which were promptly reported to the police, needed no special training to observe. Furthermore, the record in no way indicates that Mr. Spolar's actions were any other than those of a private citizen performing his civic duty.

The facts testified to by the State's witnesses create a full picture of the crime and the subsequent apprehension and arrest of the assailant. We cannot say the matters raised by deefndant in any way impair the credibility of the State's witnesses so as to raise a reasonable doubt as to his guilt.

The judgment is affirmed.

JUDGMENT AFFIRMED

APPENDIX B

ORDER DENYING LEAVE TO APPEAL

The following order was entered, *per curiam,* by the Supreme Court of Illinois on January 20, 1966:

> "And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein."